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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF ALASKA

MOTION OF

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska

TO DISMISS OR AFFIRM

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Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

MOTION TO DISMISS OR AFFIRM 1

I. STATEMENT OF THE CASE 2

II. ARGUMENT 2

A. The Issue Raised by This Appeal is Very Narrow 3

B. The State Has A Duty to Provide for the Welfare of its Residents 5

C. Alaska Has Effected its Duty, in Part, by Adoption of Local Hire 7

D. Local Hire Does Not Violate the Privileges and Immunities Clause 10

1. McCready is Still Good Law 10

2. Even if the McCready "Exception" No Longer Exists, Local Hire Still Satisfies Standards Applicable to Privileges and Immunities Questions 14

E. Local Hire is Another Example of Valid Discrimination in Favor of Residents Approved by the Court 19

III. CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Barbier v. Connolly, 113 U.S. 27 (1884) 6

C.D.R. Enterprises, Ltd. v. Board of Education, 412 F.Supp. 1164 (1976), aff'd __ U.S. __, 97 S.Ct. 721 (1977) 6

Douglas v. Seacoast Products, Inc., 45 L.W. 4488 (1977) 4

Edwards v. California, 314 U.S. 160 (1941) 3, 11

Cases, continued:	Page
Examining Board v. Flores de Otero, 426 U.S. 572 (1976)	9
Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	3, 8
Geer v. Connecticut, 161 U.S. 519 (1896)	13
H.P. Hood & Sons v. Dumond, 336 U.S. 525 (1949)	11, 14
Kleppe v. State of New Mexico, 426 U.S. 529 (1976)	13
McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976)	19
McCready v. Virginia, 94 U.S. 391 (1877)	10, 11-14, 20
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	19
Missouri v. Holland, 252 U.S. 416 (1920)	13
Oklahoma v. Kansas Natural Gas, 221 U.S. 229 (1911)	3, 8, 9
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	3, 8, 9
Shapiro v. Thompson, 394 U.S. 618 (1969)	19
Sosna v. Iowa, 419 U.S. 393 (1975)	19
State v. Wylie, 516 P.2d 142 (1973)	8
State of New Mexico v. Morton, 406 F.Supp. 1237 (1975)	13
Sugarman v. Dougall, 413 U.S. 634 (1973)	9
Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948)	13-14
The Mayor of the City of New York v. Miln, 11 Pet. 102 (1842)	6
Toomer v. Witsell, 334 U.S. 385 (1948)	13-17
Truax v. Raich, 239 U.S. 33 (1915)	9
Vlandis v. Kline, 412 U.S. 441 (1973)	19
Younger v. Harris, 401 U.S. 37 (1971)	5

	Page
UNITED STATES CONSTITUTION	
Article IV, Section 2	4, 10
14th Amendment	3, 16
ALASKA CONSTITUTION	
Article I, Section 1	3
Article VIII, Section 2	7
STATE STATUTES	
AS 38.40	3, 16
AS 38.40.010	7, 17
AS 38.40.020	7, 17
AS 38.40.030(b)	16, 18
AS 38.40.050(a)	4, 18
ch. 183, SLA 1976	16

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TO DISMISS OR AFFIRM

Appellees Edmund Orbeck, Commissioner of the Department of Labor of the State of Alaska, and Guy Richard Martin, Commissioner of the Department of Natural Resources of the State of Alaska ("the State") herewith move this Honorable Court, pursuant to Rules 16(b) and 16(c) of the Rules of the Supreme Court of the United

States, to dismiss the above-captioned appeal of appellants Sidney S. Hicklin, *et al.* as not presenting a substantial federal question; or alternatively, to affirm the judgment of the Supreme Court of the State of Alaska. Should the jurisdictional statement of appellants be deemed a petition for certiorari, the State respectfully submits that such petition should be denied, for reasons stated herein.

I.

STATEMENT OF THE CASE

For purposes of these motions, Appellees accept the Appellants' statement of the case as set out at pages 2-8 of their Jurisdictional Statement.

II.

ARGUMENT ON APPEAL

Appellees, the Commissioners of the Alaska Departments of Labor and of Natural Resources (hereinafter "the State") disagree strenously with appellants' assertion that a substantial federal question remains as a result of the Alaska Supreme Court's decision in this case. While conjuring up dire visions of "Balkanization" and "parochial isolation" running rampant through our Nation as a result of the Alaska Court's decision, they fail to provide any analysis or explanation of why this example of a state's legislating to promote the health, welfare, peace and safety of its people should be held to be constitutionally infirm when this Court and numerous lower courts have consistently permitted states to provide benefits to their residents only. This case presents but another example of a state carrying out, within our fed-system, its function and duty of providing for the general welfare of its people.

None of the decisions of this Court cited by appellants requires reversal of the Alaska Court. In fact, most of the cases relied on by the appellants involve commerce clause or federal pre-emption issues; they are not authority for privileges and immunities clause claims – the only claim raised by appellants in their Jurisdictional Statement. We think it clear, upon a consideration of relevant cases, the majority decision of the Alaska Supreme Court, and appellants' Jurisdictional Statement, that the Alaska Court's decision should be affirmed or, in the alternative, that this appeal should be dismissed for want of a substantial federal question.

A. THE ISSUE RAISED BY THIS APPEAL IS VERY NARROW.

In evaluating the arguments of appellants, it is important to keep in mind what this case does and does not involve:

1. The Alaska Supreme Court did not view the State's Local Hire Law, AS 38.40, as creating an impermissible classification between Alaska residents and non-residents under the equal protection clause of the 14th Amendment to the United States Constitution or Article I, Section 1 of the Alaska Constitution. Although appellants challenged the Act on equal protection grounds below, they have not raised the issue here.

2. Appellants have never challenged Local Hire under the commerce clause. Nevertheless, they have chosen to rely on commerce clause cases in their Jurisdictional Statement. E.g., *Oklahoma v. Kansas Natural Gas,* 221 U.S. 229 (1911); *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923); *Foster Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928); and *Edwards v. California,* 314 U.S. 160 (1941). As we will show, these cases are inapposite and cannot form the basis for a determination that the appeal

raises a substantial federal question under the privileges and immunities clause.

3. The case does not involve any issues of federal pre-emption, despite the reliance of both the dissent in the Alaska Supreme Court's decision and the appellants in their Jurisdictional Statement on *dicta* in a recent pre-emption decision of this Court, *Douglas v. Seacoast Products, Inc.*, 45 L.W. 4488 (1977).[1]

4. The case does involve a claim by the appellants that Local Hire's scheme for providing an employment preference in certain employment to qualified Alaska residents violates Article IV, Section 2 of the United States Constitution – the privileges and immunities clause.

5. Local Hire applies only to:

> . . . employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas purposes, unitization agreements or any of the preceding *to which the state is a party* after July 7, 1972. AS 38.40.050(a) (emphasis added)

At the height of employment on the Trans-Alaska Pipeline, Summer 1976, it applied to only about six per cent of total employment in the state. Op., p. 2a, Appendix I Appellants' Jurisdictional Statement.

[1] Appellants' reliance on certain of the "patchwork of broader language" which the Court "embroidered" on its pre-emption holding in that case appears to be just the sort of result of that language which Mr. Justice Rehnquist, joined by Mr. Justice Powell, warned against in his separate opinion, concurring in part and dissenting in part. 45 L.W. 4494.

B. THE STATE HAS A DUTY TO PROVIDE FOR THE WELFARE OF ITS RESIDENTS.

Despite appellants' fears of imminent Balkanization of our great Nation, we must point out that the United States is not one large state. Rather, it is a union of independent and sovereign states, each with full power and authority to conduct and regulate its internal affairs, consistently, of course, with those powers retained to the federal government by the Constitution. This is our system of federalism, founded as it is on "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

In 1837, this Court described the authority and duty of the states as follows:

> We . . . plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these the authority of a State is com-

plete, unqualified and exclusive. *The Mayor of the City of New York v. Miln*, 11 Pet. 102, 144.

In 1884, Mr. Justice Field, speaking for this Court on the effect of the 14th Amendment on matters within a State's sovereignty, said:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and the good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity, *Barbier v. Connolly*, 113 U.S. 27, 28 L.Ed. 923, 925.

These precepts have not diminished over the intervening years, as shown by a case also quoted, for some reason, by appellants:

> *The state has a duty to all its lawful residents*, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, and that they have equal access to private employment. *Truax v. Raich, supra. Its duty to reduce employment* is as much a duty to the alien as to the citizen . . . *C.D.R. Enterprises, Ltd. v. Board of Education*, 412 F.Supp. 1164, 1170 (1976), aff'd ___ U.S. ___, 97 S.Ct. 721 (1977) (emphasis added)

But in addition to the general duty imposed on it as one of the several states within our federal system, the State of Alaska is also under an expressly stated duty to

assure that its natural resources are developed and utilized for the benefit of its people:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and water, for the maximum benefit of its people. Article VIII, Section 2, Alaska Constitution.

It is within the framework of these duties to provide for the welfare of its residents that Alaska's Local Hire Law must be evaluated.

C. ALASKA HAS EFFECTED ITS DUTY, IN PART BY ADOPTION OF LOCAL HIRE .

The first two sections of the Local Hire Law make it clear that it was adopted with reference to the general and express duties described above:

> Sec. 38.40.010. STATE POLICY. It is the policy of the state in the development of its natural resources to seek and accomplish the development of its human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management.
>
> Sec. 38.40.020. LEGISLATIVE FINDINGS. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has

an obligation to assure that the benefits of this employment enure to the residents of the state.

From these provisions it can be seen that the State sought to guarantee that its land and the natural resources on and below it, the common property of its people, would be developed and used to provide the maximum benefit and return possible to them. Accomplishing this purpose meant more than simply assuring that State resources consisting of tax receipts and royalty rights were expended or otherwise applied in the people's interest to build new schools and highways or provide increased services or reduce taxes. It included, as well, assuring that the State's natural resources (those which it owns) are similarly utilized, if at all, in the interest of its people, individually and collectively, toward the end of benefiting Alaska's society and economy overall – "reducing unemployment and 'upgrading Alaska's human resources.' "[2]

Despite the clear language of the Act, however, appellants have yet to focus properly on the application and effect of Local Hire. Unlike the situation in the commerce clause decisions cited by appellants which dealt with the efforts of certain other states to restrict the availability of natural resources produced within those states (*Oklahoma v. Kansas Natural Gas, supra; Pennsylvania v. West, supra;* and *Foster Fountain Packing Co. v. Haydel, supra*), Alaska's Act places no restriction on the

[2]The Alaska Supreme Court has said that "reducing unemployment and 'upgrading Alaska's human resources' " is a compelling governmental interest for purposes of the equal protection strict scrutiny test. State v. Wylie, 516 P.2d 142 (1973). Despite the existence of such an interest in the case, however, it struck the one-year *durational* residence requirement imposed by the State for purposes of an employment preference in State hiring on the grounds that the one-year requirement was not sufficiently tailored to accomplish the valid interest.

product. Further, the Act applies only to oil and gas related property owned, in the true legal sense, by the State of Alaska and not, as was the case in *Oklahoma* and *Pennsylvania,* to all property of a specific kind (natural gas) within the state's borders, be it publicly or privately held. Finally, the Act establishes the resident employment preference provisions as a necessary condition of any oil and gas lease, right-of-way permit etc. granted by the State, or lessor.

The State's nexus with the subject matter it is regulating for the promotion of the general welfare is, therefore, very real and direct. It arises out of ownership and is not based simply on some general attribute of sovereignty authorizing the State to exercise control over the business decisions of private employers. The proposition that a state may regulate the use of the resources which it, on behalf of its people, owns was clearly acknowledged by this Court in *Truax v. Raich,* 239 U.S. 33 (1915) when Mr. Justice Hughes, speaking for the Court in upholding the validity of an Arizona statute attacked as a violation of equal protection for discriminating against aliens,[3] said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.

Ibid, pp. 39, 40.

[3]Recent decisions of this Court treating alienage as a suspect classification for purposes of equal protection analysis, e.g., Examining Board v. Flores de Otero, 426 U.S. 572 (1976); Sugarman v. Dougall, 413 U.S. 634 (1976) cast substantial doubt on the continuing validity of the holding as it applied to aliens who were residents of Arizona.

Local Hire does no more than limit the distribution of the State's resources and property (those which it owns) and interests in them in a manner which is designed to assure maximum "enjoyment" to Alaskans. In attacking the Act, the appellants would have this Court treat the case as one raising a substantial federal question under the privileges and immunities clause, yet they try to do so on the basis of decisions by this Court invalidating state action in various contexts under the commerce clause, the equal protection clause of the 14th Amendment, and federal pre-emption. As such, the cases are immediately distinguishable and provide no basis for testing the validity of Local Hire under Article IV, Section 2 of the Constitution. At the same time, appellants have attempted no analysis of relevant privileges and immunities precedent to show how they believe the Act fails to comport with this Court's approach to cases raising that issue. Since appellants have provided no argument on that issue to which we can affirmatively respond, we will simply set out our analysis of Local Hire's validity under the privileges and immunities clause.

D. LOCAL HIRE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE.

1. McCready is Still Good Law.

In upholding the Act against appellants' attack under the privileges and immunities clause, the Alaska Supreme Court stated that it was relying on the "natural resources exception" to the application of that clause recognized by this Court in *McCready v. Virginia*, 94 U.S. 391 (1877). The Court reasoned as follows:

> *McCready v. Virginia, supra,* has been distinguished, but it has never been overruled. We have concluded that it states the principle applicable to

the decision of this case. Article VIII, Section 2 of the Alaska Constitution, stating that Alaska's natural resources shall be used and developed in ways that will benefit Alaska's people, is not inconsistent with the privileges and immunities clause. The natural resources of Alaska "belong" to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Appellants, of course, strenuously object to this line of reasoning. They correctly point out that, under *Pennsylvania v. West Virginia*, 262 U.S. 553, 67 L.Ed. 1117 (1923) and *West v. Kansas Natural Gas Co.*, 211 U.S. 229, 55 L.Ed. 716 (1911), Alaska could not allow the export of oil or gas only after all local needs were met. But these cases were decided under the commerce clause, not the privileges and immunities clause. One of the principal reasons the United States Constitution was written, to replace the Old Articles of Confederation, was to make the United States a single economic unit, without barriers to interstate trade. *See generally, H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 530-39, 93 L.Ed. 865, 870-75 (1949). Laws forbidding or burdening exports from a state, or imports into it, are inconsistent with that principle.

But no commerce clause claim is advanced against Alaska Hire. Accepting the premise that the United States had and should have one common economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Edwards v. California, 314 U.S. 160, 86 L.Ed. 119 (1941), does not compel a decision to the

contrary. In *Edwards*, the Court held invalid a state law making it a crime to assist indigent non-residents to come into the state. In purpose and in effect, the law was a direct barrier to interstate travel and migration. Alaska Hire does not errect a barrier to interstate travel or migration. With the durational residence requirement stricken, it permits new as well as long-time residents to receive a preference. It gives the state's benefits to those who bear its burdens, without placing any limitation or who may voluntarily assume those benefits and burdens. *Op.* pp. 17a, 18a, Appendix I, Appellants Jurisdictional Statement.

Appellants assert that the *McCready* "exception"[4] relied on by the Alaska Supreme Court needs limiting clarification, if not overruling. We disagree.

McCready involved a privileges and immunities attack on Virginia's restricting solely to its own citizens the use of the land beneath its navigable waters for the purpose of planting and growing oysters. This Court rejected that attack and upheld the restriction, indicating that the privileges and immunities clause had no application to this type of regulation which was, "in effect, nothing more than a regulation of the use by the People of their common property". The Court then went on to say:

> . . . we think we may safely hold that the citizens of one state are not invested by this clause of the

[4]Although over the years the Court's decision in *McCready* has been regularly described by the courts and commentators as creating an exception to the privileges and immunities clause, it seems to us that the better analysis is to characterize the decision as declaring that sharing in the regulation and distribution of the resources of a given state is not a privilege or immunity of citizens in the several states.

> Constitution with any interest in the common property of the citizens of another state.

Ibid., p. 396.

As the Alaska Supreme Court pointed out in its decision, *McCready* has never been overruled. It has, however, already been clarified through limitation. We know now that *McCready* does not apply to free-swimming fish in the marginal sea, *Toomer v. Witsell*, 344 U.S. 385 (1948), but that it does apply to wildlife which does not migrate across state lines. *Geer v. Connecticut*, 161 U.S. 519 (1896); *Missouri v. Holland*, 252 U.S. 416 (1920).[5] Additionally, it is now clear that *McCready* may not be relied upon to support discrimination by a state against an alien who is a resident of the State. *Takahashi v. Fish and*

[5]This Court had the opportunity to further limit or even overrule *McCready* as it applied to wild animals last year in the case of Kleppe v. State of New Mexico, 426 U.S. 529 (1976). The lower court in that case, which dealt with the constitutionality of the Wild Free-Roaming Horses and Burros Act, had ruled that Act unconstitutional, in part on the theory that the states owned the wild animals within their borders and observing that "[e]ven though the state ownership doctrine has been described as a legal fiction, it has never been abrogated." State of New Mexico v. Morton, 406 F.Supp. 1237 (1975). Although this Court reversed the lower court and held that act constitutional, it did not avail itself of the opportunity to overrule or even further limit *McCready*. The Court simply repeated what it had said years ago:

> Unquestionably the states have broad trustee and police powers over wild animals within their jurisdiction. But as *Geer v. Connecticut* cautions, those powers exist only "in so far as their exercise may not be incompatible with, or restrained by the rights conveyed to the Federal government by the Constitution." 161 U.S., at 528. (citations omitted) *Kleppe, supra*, at 545.

We certainly have no disagreement with that proposition as it applies to the regulation of Alaska's wild animals or its natural resources.

Game Commission, 334 U.S. 410 (1948). Finally, the purpose and scope of the *McCready* ownership theory has been defined by this Court as "expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer, supra* at 402.

Given this decisional framework, we fail to understand why appellants believe *McCready* requires either additional clarification or the judicially drastic step of overruling. The entire direction of their argument in this regard (and that of the two dissenting justices of the Alaska Supreme Court) seems to focus on the possibility that application of *McCready* to state laws limiting the distribution of natural resources to residents will give rise to the economic Balkanization which the commerce clause, not the privileges and immunities clause, was adopted to prevent. See, e.g., *H. P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525 (1949). Certainly, if the effect of such laws were to create an impermissible burden on interstate commerce, those laws should be struck down on that basis. However, a holding that a law is unconstitutional as a violation of the commerce clause is hardly equivalent to saying that, as a matter of law, the challenged statute also violates the privileges and immunities clause. This is the fallacy in appellants' Jurisdictional Statement.

2. Even if the McCready "Exception" No Longer Exists, Local Hire Still Satisfies Standards Applicable to Privileges and Immunities Questions.

But let us assume, *arguendo,* that the "natural resources exception" recognized by *McCready* and subsequent cases is no longer viable to preclude judicial examination, under the privileges and immunities clause, of state enactments which deal with the regulation and

distribution of those natural resources within the state which belong to it and its people. That does not automatically mean, as appellants mistakenly take for granted[6], that Local Hire violates the privileges and immunities clause. As the Court stated in *Toomer, supra:*

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. (footnote omitted)

Ibid., p. 396.

The Court went on to express the following caveat:

> The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Ibid., p. 396.

Certainly, Local Hire operates to discriminate against non-residents in favor of certain Alaska residents[7], i.e.,

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[6] Nowhere in their Jurisdictional Statement do appellants either state the test articulated by this Court for analyzing the validity of state enactments challenged under the privileges and immunities clause or set out their analysis of how Local Hire fails to meet the standards of that test.

[7] As in Toomer, *supra,* 397, we see no point in asserting that Local Hire is outside the scope of the privileges and immunities clause because it speaks in terms of residents instead of citizens.

those who are available and qualified to perform the work. AS 38.40.030(b).[8] Appellants apparently admit, however, that the classifications of resident/non-resident and the difference in treatment accorded them by the Act do not violate their equal protection guarantees under the 14th Amendment. As we pointed out *ante,* at 3, appellants raised equal protection claims in the Alaska courts under both the Alaska and United States Constitutions. These claims were resolved by the Alaska Supreme Court in favor of the constitutionality of the Act (absent the original one-year durational residency requirement which was struck by the Alaska Court). Appellants have raised no equal protection issue in their Jurisdictional Statement. Consequently, if judicial scrutiny of privileges and immunities claims is no more exacting than that undertaken in equal protection claims,[9] it would seem that, by admitting that Local Hire does not violate equal protection, appellants have foreclosed themselves from asserting that it does violate their privileges and immunities.

But even if the Court's privileges and immunities test is more stringent than its lower tier equal protection test, we think it so clear that the Act will withstand this Court's scrutiny as to call for summary affirmance. The applicable test, as stated in *Toomer, supra,* is two-pronged:

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[8]Local Hire was amended by the Alaska Legislature in a number of ways in 1976. Appellants' Appendix II, pp. 31a-37a of their Jurisdictional Statement, which purportedly sets out the Local Hire Act, AS 38.40, fails to incorporate those amendments. We have, therefore, set out the amendments, as enacted by ch. 183, SLA 1976, in Appendix I to this brief.

[9]". . . the States should have *considerable leeway* in analyzing local evils and in prescribing appropriate cures." Toomer, *supra,* p. 396. (emphasis added)

1. Are there valid independent reasons for the disparity of treatment?

2. Does the degree of discrimination bear a close relation to those reasons?

These two standards are to be considered in light of "the principle that the States should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer, supra,* p. 396.

We have already demonstrated that there are valid independent reasons for the preference in oil and gas-related employment given to Alaska residents under Local Hire. In enacting Local Hire, the Legislature stated that it sought to accomplish the development of the State's human resources by providing maximum employment opportunities for its residents in conjunction with natural resources management. AS 38.40.010. The Legislature found that "Alaska has a uniquely high unemployment record among the states due to both cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention" and that "the state has an obligation to assure that the benefits of [employment opportunities resulting from exploitation of the state's natural resources] enure to the residents of the state." AS 38.40.020. Additionally, as a state within our federal system, it is the function and duty of Alaska to provide for the general welfare of its own people (i.e., residents), and Local Hire is one of the means chosen by the Legislature to further that general welfare.

As to whether the degree of discrimination established under Local Hire bears a close relation to the reasons for it, we find it difficult to see how anyone could seriously assert that it does not. Certainly appellants have made no

such claim in their Jurisdictional Statement.[10] Local Hire does not apply to all private employment in the state. Further it does not even apply to all oil and gas-related employment in the state. It applies only to that oil and gas-related employment which arises as a result of "oil and gas leases, easements, or right-of-way permits for oil or gas pipeline purposes, utilization agreements or any of the preceding *to which the state is a party* after July 7, 1972." AS 38.40.050(a). As we pointed out earlier, the state has a direct proprietary and contractual nexus to the covered employment.

The law's application is further conditioned as follows:

> . . . the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor. AS 38. 40.050(a)

Finally, and probably most important, Local Hire is not even a bar to that employment which is subject to the Act. The Act only requires that Alaska residents who are available and qualified to do the work be hired before non-residents are hired. AS 38.40.030(b). As pointed out by the Alaska Supreme Court, the effect of this employment preference for Alaska residents has been to leave about one quarter of the covered jobs to non-residents. *Op.*, p. 11a, Appendix I, Appellants' Jurisdictional Statement.

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[10] Appellants have never asserted that the State has no duty to provide for the welfare of its residents, or that it may not effect this duty by discriminating in their favor.

Given the extremely restricted scope of the Act's discrimination, coupled with the unquestionably valid independent reasons for the discrimination, we think it clear that Local Hire must survive any degree of scrutiny which this Court might subject it to under the privileges and immunities clause. Appellants certainly have made no effort to demonstrate otherwise.

E. Local Hire is Another Example of Valid Discrimination in Favor of Residents Approved by the Court.

Before concluding, we would point out that this Court has, over the past several years, approved discriminations in favor of residents in a number of different contexts. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits); *Vlandis v. Kline*, 412 U.S. 441 (1973) (preferential university tuition rates); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (free non-emergency medical care); *Sosna v. Iowa*, 419 U.S. 393 (1975) (filing divorce actions in state court).[11] Appellants have articulated no rationale which might support the resident/non-resident discriminations involved in those cases but not support a discrimination along lines of residence under Local Hire.

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[11] While some of these decisions involved state-imposed *durational* residency requirements which the Court held to be unconstitutional as a violation of the right to travel or equal protection, we believe it clear from a reading of those decisions that this Court did not view the underlying discrimination in favor of state residents as being constitutionally infirm. See, McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 647 (1976).

III.

CONCLUSION

Based on the foregoing, we believe it clear that the decision of the Alaska Supreme Court in this matter should be affirmed. Appellants' only constitutional claim raised before this Court is based on the privileges and immunities clause, yet in attempting to demonstrate that their claim raises a substantial federal question, they rely almost entirely on holdings and *dicta* of this Court in cases involving the commerce clause and federal preemption. While we do not deny that the State may not act in a manner which is inconsistent with either of these constitutional principles, appellants have made no claim in this case that the State has done so.

Under relevant decisions of this Court, we think it may safely be said that the privileges and immunities clause has no application to decisions by states as to how, in the interest of their people, they will best regulate and distribute the natural resources which belong to the states and their people. However, if what has been referred to as the *McCready* exception does not exempt those kinds of decisions from judicial scrutiny under the privileges and immunities clause, then the appellants' claim must at least be determined against privileges and immunities standards enunicated by this Court. Appellants have failed both to state the applicable standards and to demonstrate why Local Hire does not satisfy them. We think it clear from the analysis of the Act against those standards which we have set out that Local Hire fully comports with the privileges and immunities clause.

In the alternative, we believe the Court should dismiss this appeal for lack of a substantial federal question. This case does not differ in any significant aspect from the

numerous decisions of this Court and the lower federal courts upholding state resident/non-resident discriminations where no durational residence requirement is imposed.

RESPECTFULLY SUBMITTED at Juneau, Alaska, this 7th day of October, 1977.

Respectfully submitted,

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APPENDIX I

Amendments to AS 38.40

Chapter 40. Local Hire Under State Leases.

Sec. 38.40.030. Resident employment. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, all in accordance with the provisions of this chapter.

(b) All employment falling within the purview of § 50 of this chapter shall be filled by Alaska residents if they are qualified and available. The commissioner of labor, whose decision is final as to residency, shall determine the resident status of individuals for purposes of this chapter and issue a certificate to persons determined to be residents of the state. The commissioner may issue exemptions from this chapter to the employer for those individuals he shall determine to be administrative, management, or professional employees of the employer.

* * *

(d) The Department of Labor shall adopt regulations necessary to implement the provisions of this chapter.

Sec. 38.40.040. Reporting provisions. (a) An employer obligated to meet resident employment requirements under this chapter shall comply with those reporting provisions which the commissioner of labor determines are reasonably necessary to carry out the purposes and intent of this chapter.

(b) The Department of Labor shall prepare a list of certified Alaska residents and, upon request, shall make it available to an employer subject to this chapter, and to any employment or dispatching agency, union, or other entity.

Sec. 38.40.060. Hearings and investigations. (a) The Departments of Labor and Natural Resources shall promulgate appropriate regulations to implement the provisions of this chapter. It is the employer's responsibility to initially determine and adjudge the work qualifications of the prospective employee. A qualified Alaska resident who has been rejected for or terminated from employment by an employer subject to this chapter may, within 15 days from the rejection or termination, file a written request for a hearing before the Department of Labor to determine if the employer is in compliance with the provisions of this chapter. The department shall investigate, set a date for and hold a hearing within 30 days after receipt of the request, unless the person applying requests a longer period of time.

(b) The Department of Labor may, on its own motion, conduct appropriate investigations and hearings to determine compliance with the provisions of this chapter.

(c) The commissioner of labor, acting on a complaint or his own motion, upon finding wilful noncompliance by an employer with the provisions of this chapter, may certify that finding to the Department of Natural Resources.

(d) Hearings and investigations conducted under this section are not subject to the Administrative Procedure Act (AS 44.62), but are subject to judicial review under § 70(a) of this chapter if appealed within 30 days.

Sec. 38.40.070. Penalties. (a) Upon finding that a qualified Alaska resident has been rejected for or terminated from employment, in violation of this chapter, the Department of Labor may require the employer to pay the qualified Alaska resident triple the wages he lost, or any damages or expenses actually incurred as a result of the wrongful action if they exceed the triple wages assessed. The imposition or withholding of any payment or penalty under this section may be appealed to the superior court. The superior court shall hear these matters de novo.

(b) The Department of Natural Resources, upon receipt of a certification of wilful noncompliance of an employer by the commissioner of labor and after appropriate investigations and hearings, may impose the following penalties:

(1) increase rent or other forms of compensation received by the State by a factor of no more than 10 but in no event to exceed $100,000;

(2) require that all or any portion of project operations be halted;

(3) stop payment on any or all existing contracts between that person and the state; or

(4) remove, for an appropriate period of time, the eligibility of the person to contract with the state or any of its political subdivisions.

(c) Notwithstanding (a) of this section, no penalty may be imposed against a lessee because of noncompliance with the provisions of this chapter by a supplier of the lessee's contractor or subcontractor if the lessee has

received and retained a certificate from the supplier certifying that the supplier is in compliance with the provisions of this chapter. However, no certificate from the supplier is a bar to the imposition of a panalty against a lessee unless the certificate was made (1) upon oath or affirmation, (2) on forms prepared by the commissioner of labor furnished to the lessee before the date of the supplier's noncompliance, and the lessee has furnished a copy of the certificate to the commissioner of labor together with additional information the commissioner may require, and (3) by a supplier who is not himself a contractor or subcontractor of the lessee.

(d) The commissioner of labor may, by regulation, designate the intervals within which certificates of suppliers must be furnished under this section in order to constitute a bar against the imposition of penalties.

Sec. 38.40.080. Injunctive relief. The Department of Labor or the Department of Natural Resources, in addition to the imposition of any penalties under § 70 of this chapter, may seek injunctive relief against an employer not in compliance with the provisions of this chapter. Either department may seek injunctive relief to enforce penalties which it has imposed under § 70 of this chapter.

Sec. 38.40.090. Definitions. In this chapter

(1) "resident" means a person who

(A) except for brief intervals, military service, attendance at an educational or training institution, or for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;

(B) maintains a place of residence in the state;

(C) has established residency for voting purposes in the state;

(D) has not, within the period of required residency, claimed residency in another state; and

(E) shows by all attending circumstances that his intent is to make Alaska his permanent residence;

(2) "qualified" means capable, through education, training, or experience, of performing the duties and satisfying the usual terms and conditions of the employment, if those duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry;

(3) "wilful noncompliance" means intentionally, knowingly, or purposely, without justifiable excuse, not giving preference to qualified Alaska residents in employment covered by this chapter;

(4) "noncompliance" means not giving preference to qualified Alaska residents in employment covered by this chapter.